Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SPRING VALLEY WATER COMPANY (a corporation),

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation) and TAX COLLECTOR of said City and County,

Appellees.

REPLY BRIEF FOR APPELLANT.

EDWARD J. MCCUTCHEN,
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MCCUTCHEN, OLNEY & WILLARD,
Of Counsel.

Filed this.....day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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REPLY BRIEF FOR APPELLANT.

We desire to avail ourselves of the permission granted by the court at the oral argument of these appeals to answer the following portions of respondents' brief not specifically considered in our opening brief:

(1) The court did not violate equitable discretion in ordering the payment of taxes (respondents' brief, pp. 7 and 8).

(2) The assessment was made in accordance with Section 3647 of the Political Code (respondents' brief, pp. 9-14).

(a) THE EXERCISE OF THE COURT'S DISCRETION.

Counsel for respondent thus state their contention:

> "In making the orders appealed from, the court below did not necessarily pass on the validity of the assessment. While we admit that the orders made are appealable orders as they finally dispose of the matter so far as the court below is concerned, they were orders made in the exercise of equitable discretion, and we believe that this court should go no further than to determine whether such discretion was exceeded."

They further state that, in the case of an ordinary receivership, where the receiver was in doubt as to whether the taxes were validly assessed or not, he would pay the taxes under protest and, by leave of court, bring a separate action for their recovery; that complainant may sue in the name of the depositaries in the state courts to recover taxes paid under protest; and that the lower court is justified in requiring complainant to pursue its remedy in the same manner that it would have been forced to follow had it been invested with possession and control of the property.

We think counsel have neither accurately stated the rights of appellant nor fully appreciated the obligations of the lower court. The impounded money was deposited subject to two conditions: It was to be repaid to complainant if the actions instituted by complainant were ultimately determined to be well founded, and to the ratepayers if judgment was given in favor of the city; and the fund could only be disbursed on checks drawn by the special master and countersigned by a federal judge. There was no "twilight zone" for the

exercise of discretion. The court could not consider questions of public policy or expediency. It could, at the most, order a valid charge against the fund paid and, unless it determined that such a charge was valid, it was not empowered to direct the distribution of the fund. Its plain duty was to keep the fund intact, and the orders of the lower court can only be upheld if the taxes were validly assessed.

For this reason the other arguments of counsel, even if they were valid, would work no change in the duty of the court. They are not, however, valid. Where a receiver, for instance, is directed to pay a tax against property in his custody, he could not, without stultifying the court of which he is an officer, pay them under protest. Could a court justify its action in directing payment and, at the same time, direct its own representative to contest the correctness of its own determination?

That in making the order herein considered the lower court did not make such provision is surely a sufficient answer in the present case.

Counsel, upon reflection, will, we think, agree with us that their further suggestion that appellant might sue in behalf of the depositaries to recover taxes paid under protest is entirely without foundation. What right has appellant to commence such an action when it did not personally pay the taxes and has no relation whatever with the depositaries with which the funds were impounded? How can it enforce the payment of such taxes by the bank under protest? In neither respect has it rights which it may assert. Appellant's relief must be had from the court whose protection it

sought. It cannot get it elsewhere, and it is submitted that, in making the orders complained of, the court should have passed, and necessarily did pass, upon the validity of the assessments, and that it was only empowered to distribute the funds as it did, if the assessments were legally made.

We are thus brought to the second point to be considered in this brief.

(b) THE ASSESSMENTS WERE NOT MADE IN ACCORDANCE WITH SECTION 3647 OF THE POLITICAL CODE.

Counsel concede that the assessments were invalid unless they were made in accordance with the provisions of the above section. They assert that the assessments were so made because the banks, while not actual receivers, were *de facto* receivers in the various actions. We do not appreciate the exact distinction counsel seek to draw between actual and *de facto* receivers. They concede that the actions in which these appeals were prosecuted were not of such an impression that the appointment of an "actual" receiver would be warranted or could be upheld; that the court's officer is its special master, appointed by it; that the relation between the banks and the court is purely that of depositor and depository; that no order appointing the banks receivers was ever made. But, they nevertheless persist in the contention that the banks are receivers. They concede (brief, p. 15) that "the situation is very much the same as where any bank depositor is assessed for the amount of his credit at the bank and draws a check on his account to pay the tax". But they insist that such

a relationship constitutes the bank a receiver. It is not disputed that no one of the requirements for the appointment of a receiver, as set forth in the statute law of California, or as applied by the federal courts, has been made to appear. No bond was, for instance, furnished by any one of the banks. No administrative duties of any sort were either imposed upon the depositaries or accepted by them. If such a relationship warrants a court in determining that the depositaries are receivers, it is, indeed, worthy of note that no decision to that effect will be found in any of the authorities, and that no suggestion of the sort has ever heretofore been advanced. It is submitted that it would be stretching the language of Section 3647 and the action of the parties and of the lower court beyond the breaking point to designate the depositaries in this case receivers.

It is further urged (brief, pp. 11, 12, 13) that, in making the assessment, a misnaming of the person referred to in Section 3647 would have no effect upon the validity of the assessment, and we understood counsel, at the oral argument, to go to the full length to which his argument necessarily carries him, and to contend that there was no need of designating any one, and that a reference to the fund would be sufficient. It requires no more than a reference to the section in question to show the fallacy of this contention. It is there provided:

> "Money and property in litigation, in possession of a county treasurer of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

In other words, if the fund is in possession of a county treasurer, it must be assessed to him, or, if a county clerk, to him; and it is plain that a failure to follow these specific instructions renders the assessment void.

City of San Luis Obispo v. Pettit, 87 Cal. 499.

It is our opinion that the section herein considered was not intended to cover funds in litigation in the federal courts. The phraseology of the statute seems to us to indicate that it was money in litigation in the state courts which it was intended to reach. Doubtless the observance of rules of comity dictated this distinction. Whether this is so or not, the most that can be claimed for the section is that it does not clearly cover the present situation. Since this is so, we are plainly entitled to invoke the rule so often laid down and applied in the federal and state courts, that tax proceedings are *in invitum* and, that unless the sovereign expresses "its intention to tax in clear and unambiguous language", the doubt will be resolved in favor of the taxpayer. It was, for instance, said in

Eidman v. Martinez, 184 U. S. 578, 583; 46 L. Ed. 701:

> "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of *exception* confining the operation of duty (citing cases).
>
> "We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that

> the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language."

Respondents' discussion of the other points urged in our opening brief require no additional consideration by us here.

It is respectfully submitted that the orders should be reversed.

Dated, San Francisco,
March 22, 1915.

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